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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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LESLIE R. BARTH, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
IN OPPOSITION**

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### **QUESTIONS PRESENTED**

1. Whether a transcript of oral findings satisfies the requirement of a "written statement" in a probation revocation hearing.
2. Whether the evidence was sufficient to support revocation of petitioner's probation.
3. Whether petitioner received adequate notice of the probation condition he violated.



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## **OPINIONS BELOW**

The opinion of the court of appeals, Pet. App. 1-10, is reported at 899 F.2d 199. The findings of the district court are unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on March 27, 1990. A petition for rehearing was denied on July 27, 1990. Pet. App. 11-12. The petition for a writ of certiorari was filed on October 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following his 1986 conviction for willfully failing to file tax returns, petitioner was sentenced to two four-year terms of probation in the United States District Court for the District of Connecticut. In 1989, the probation office filed a motion to revoke petitioner's probation on the ground that he had violated the conditions of his probation. The district court found that petitioner had intentionally violated one of those conditions and revoked his probation. The court of appeals upheld the district court's finding that the condition had been violated, but remanded for consideration of whether the violation was sufficiently serious to warrant revocation of probation.

1. In 1989, the probation office filed two petitions for probation action with the district court. The first charged that petitioner had misstated his income on a number of tax returns. Pet. App. 3. The second charged that petitioner had taken two trips to England in violation of standard condition four of his probation, which prohibited petitioner from leaving the judicial district without the permission of his probation officer. Gov't C.A. Br. 2; Pet. App. 3.<sup>1</sup>

At a hearing on September 28, 1989, petitioner's probation officer testified that she explained standard condition four to petitioner, who signed a form indicating that he understood it. Pet. App. 9. The probation officer further testified that she gave petitioner permission to travel within the United States for business purposes, but not to travel outside the country. *Ibid.* Notwithstanding standard condition four (as modified by the probation officer), petitioner's passport showed that he had traveled to London on

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<sup>1</sup> The first charge was dismissed without prejudice when petitioner's probation was revoked on the second charge. C.A. App. A163, A184.

April 2 and April 18, 1989, as charged in the probation petition. His passport also showed that he had traveled to London in April 1988, to the Cayman Islands in April and May 1988, and to the Netherlands and London on April 5, 1989. Gov't C.A. Br. 6. Petitioner admitted that he had made the trips indicated on his passport, but he testified that the probation officer had given him permission to travel on business anywhere in the world. Gov't C.A. Br. 7.

The district court found the probation officer's testimony credible, and petitioner's testimony not credible in most material respects. C.A. App. A151. The court found that petitioner's April 1989 trips constituted a knowing and willful violation of standard condition four, and pointed to petitioner's additional international travel and concealment of his passport as evidence of willfulness and intent. Pet. App. 4. Accordingly, the court revoked petitioner's probation and sentenced him to one year in jail. *Ibid.*

2. On appeal, petitioner argued that the procedure followed by the district court in revoking his probation was deficient in three respects. First, petitioner contended that the district court violated the Fifth Amendment's Due Process Clause when it failed to provide specific written reasons for revoking his probation and failed to consider whether violation of the travel condition was serious enough to warrant revocation. Pet. App. 4-5. Second, he argued that the evidence was insufficient to warrant revocation. Third, he claimed that he had no notice that he could not travel outside the United States. *Id.* at 5.

The court of appeals remanded for a determination whether petitioner's violation warranted revocation of his probation, but otherwise rejected petitioner's contentions. Pet. App. 10. First, the court of appeals held that as long as the record is sufficient to permit appellate review, as



it was here, the district court's transcribed oral findings satisfy the requirement of a "written statement by the factfinder" to which petitioner is entitled under *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973), and *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). Pet. App. 6.

Second, the court held that the evidence was sufficient to support revocation of petitioner's probation. The court pointed to the district court's finding that petitioner had made more than one trip abroad and stated that the trial court could reasonably have concluded that petitioner resisted its order to turn over his passport in order to conceal his travel abroad. Pet. App. 7-8. As to petitioner's claim that the district court had not considered whether the violation of the travel condition was serious enough to justify revocation, the court of appeals concluded that it was "perhaps implicit" in the district court's findings that the violation was of sufficient magnitude to warrant revocation of probation, but the court remanded the case to the district court for explicit consideration of that issue. *Id.* at 7, 10.

Third, the court of appeals held that petitioner had received notice of the travel condition that he violated and for which his probation was revoked. The court found that standard condition four clearly prohibited travel outside the judicial district and that the probation officer's oral modification of that restriction permitted business travel only within the United States. Pet. App. 9.<sup>2</sup>

3. On remand, the district court found petitioner's violation sufficiently serious to warrant revocation of probation and imposed a one-year prison sentence. The dis-

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<sup>2</sup> Petitioner repeats the claims, made through his testimony, that the probation officer waived standard condition 4 for business travel, Pet. 6, but the court of appeals accepted the district court's finding that "in most material respects \* \* \* [petitioner's] evidence is not credible," Pet. App. 8.

trict court made oral findings to that effect on October 1, 1990, and issued a written order on October 11, 1990.

### ARGUMENT

1. Petitioner argues that the district court violated the Due Process Clause by failing to issue a written opinion explaining its decision to revoke his probation. Pet. 9-11.

In *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), this Court extended to probationers faced with revocation proceedings the same due process rights accorded to parolees by *Morrissey v. Brewer*, 408 U.S. 471, 485-489 (1972). Accordingly, before probation may be revoked, a probationer is entitled to, *inter alia*, "a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." *Black v. Romano*, 471 U.S. 606, 612 (1985).

The court of appeals correctly held that the requirement of a "written statement" is satisfied by a transcript of the district court's oral findings. The transcript is itself a "written statement," and nothing would be accomplished by requiring the district court to have the transcribed oral opinion reissued as a written opinion of the court. As petitioner concedes, Pet. 10, the purpose of the written statement requirement is to facilitate appellate review. See *Black v. Romano*, 471 U.S. at 613-614. Transcribed oral findings that set forth the actual and legal basis for revoking probation fully satisfy that purpose. For that reason, courts of appeals in two circuits have accepted transcribed oral findings as "written statements." See *United States v. Yancey*, 827 F.2d 83, 89 (7th Cir. 1987) (purpose of written statement requirement is satisfied when transcribed oral findings enable reviewing court to determine basis of judge's decision), cert. denied, 485 U.S. 967 (1988); *United States v. Rilliet*, 595 F.2d 1138, 1140 (9th Cir. 1979) (no

need for written findings because "[i]t is clear to us why the district judge revoked probation. He orally stated his reasons on the record. We need no more to review this case."); see also *Morishita v. Morris*, 702 F.2d 207 (10th Cir. 1983).<sup>3</sup>

Contrary to petitioner's contention, Pet. 10, the decision of the court of appeals in this case and those cited above do not conflict with the decisions of the Fifth Circuit in *United States v. Lacey*, 648 F.2d 441 (1981), or the Eighth Circuit in *United States v. Smith*, 767 F.2d 521 (1985). In *Lacey*, the Fifth Circuit analyzed the district court's oral statement of reasons and found it inadequate because one of the grounds for revocation on which the district court might have relied was unsupported by the evidence. 648 F.2d at 444-445. Other than quoting from *Morrissey*, 471 U.S. at 489, about the need for a "written statement \* \* \* as to the evidence relied on and reasons for revoking," see *Lacey*, 648 F.2d at 445, the court did not discuss the written statement requirement at all. There is no indication in *Lacey* that the court would have found a full and complete oral statement of findings to be insufficient. *Lacey* is therefore consistent with the decision of the court of appeals in this case. Any doubt on this score is dispelled by *United States v. Martinez*, 650 F.2d 744 (1981), in which the Fifth Circuit indicated that transcribed oral findings are not *per se* insufficient in that circuit: "We do not hold nor imply that findings and conclusions as dictated into the record and transcribed by the court reporter do not meet the requirement." *Id.* at 745 n.1.

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<sup>3</sup> This use of transcribed oral findings is consistent with *Black v. Romano*. In that case, the Court stated that "[t]he memorandum prepared by the sentencing court and the transcript of the hearing provided the necessary written statement explaining the evidence relied upon and the reason for the decision to revoke probation." 471 U.S. at 616 (emphasis added).

In *Smith*, the district court apparently revoked probation without explaining its reasons either orally or in writing. 767 F.2d at 522. The Eighth Circuit reversed in part because it was impossible to determine from the record which of two alleged violations formed the basis of the district court's revocation decision. *Id.* at 524. *Smith* is consistent with the decision below; both recognize that a statement—written or transcribed—must be sufficient to permit appellate review. As the court of appeals explained, “we might rule differently were we faced with ‘general conclusory reasons by the district court for revoking probation,’ *Lacey*, 648 F.2d at 445, or with a record from which we were ‘unable to determine the basis of the district court’s decision to revoke probation.’ *Smith*, 767 F.2d at 524.” Pet. App. 6.

2. Petitioner contends that the evidence was not sufficient to warrant revocation of his probation. Pet. 11-18.

As the court of appeals explained, Pet. App. 7, the decision whether to revoke probation involves two determinations: whether the probationer violated a condition on his probation, and whether that violation warrants revocation. *Black v. Romano*, 471 U.S. at 611. The decision under review relates solely to the first determination—whether petitioner violated the travel condition of his probation; the court of appeals remanded with respect to the second, discretionary determination whether petitioner’s violation merits revocation of his probation.

The evidence clearly supports the finding by both courts below that petitioner violated the travel condition of his probation. Petitioner’s passport documented his trip abroad. One of his written probation conditions was that he could not leave the judicial district without the permission of his probation officer. And the probation officer testified credibly that she had told petitioner he could not leave the country without the permission of the court,

which petitioner never obtained. Petitioner's contrary testimony that he received blanket permission from the probation officer to travel anywhere in the world on business was found not credible by the district court, a finding that was sustained by the court of appeals. The district court further found that petitioner's trips abroad in April 1989 were made in willful and knowing violation of the travel condition. C.A. App. A152.

Intentional violations of a probation condition, such as those committed by petitioner, are sufficient grounds for revocation of probation. "If a probationer is given a short list of reasonable commands he is obligated to follow, willful refusal to abide by these specific conditions may indicate that the probationer is simply incapable of complying with authority. Such a conclusion would justify revocation." *Black v. Romano*, 471 U.S. at 623 n.21 (Marshall, J., concurring); see *United States v. Morin*, 889 F.2d 328 (1st Cir. 1989) (upholding probation revocation involving violation of travel restriction); *United States v. Cartwright*, 696 F.2d 344, 349 (5th Cir. 1983); *United States v. Nagelberg*, 413 F.2d 708 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970).

Petitioner's remaining contentions were more appropriately addressed to the district court on remand, and are not presently before this Court. Those contentions include petitioner's assertions that his willful and repeated probation violations did not warrant revocation, Pet. 12, and that his claimed compliance with other conditions of his probation should excuse his willful non-compliance with the travel restriction, *id.* at 12-13.

3. Petitioner contends that he did not receive adequate notice of the travel restriction. Pet. 18-20. Both courts below found, however, that petitioner did receive notice of the travel restriction. He received written notice that standard condition four confined him to the judicial

district unless he obtained the permission of the probation officer, and he signed a form acknowledging that condition. Pet. App. 9. Furthermore, the probation officer testified that she specifically told petitioner that he needed permission from the court to travel abroad. *Id.* at 8. Both the formal condition of probation and the probation officer's statement provided petitioner with "fair warning" that he could not travel abroad without permission. See generally *United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987).

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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